Supreme Court, U.S.
FILED
95-611 OCT 3 1995
OFFICE OF THE CLERK

(1)

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Daniel F. George and Michael Mulvey,
Individually and as police officers of
the City of Worcester,
Petitioners,

v.

Joseph F. Consolo,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

# PETITION FOR A WRIT OF CERTIORARI

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October 1995

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## QUESTIONS PRESENTED

I. Whether this case is important because it presents the Court with the opportunity to decide, for the first time, the degree of culpability necessary to show a denial of a pretrial detainee's due process right to medical care.

II. Whether the First Circuit's application of the "deliberate indifference" standard in the case below conflicts with the Fifth Circuit's application of the reasonable medical care standard.

III. Whether the First Circuit's decision below is erroneous, both as to the improper tort-based jury instruction on "deliberate indifference," and as to the police officers' entitlement to qualified immunity from the "deliberate indifference" claim.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Daniel F. George and Michael Mulvey, Individually and as police officers of the City of Worcester, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-18a) is reported at 58

F.3d 791 (1st Cir. 1995). The opinion of the district court on motions for judgment notwithstanding the verdict, new trial and remittitur (App., infra, 19a-27a) is unreported.

## JURISDICTION

The court of appeals entered its judgment on July 5, 1995. (App., infra, 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In pertinent part, section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

In pertinent part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

## STATEMENT OF THE CASE

### A. The Arrest

This is a civil rights case arising out of an arrest conducted by the City of Worcester, Massachusetts Police Department on April 9, 1990.

On April 7, 1992, Plaintiff Joseph F. Consolo (hereinafter "Plaintiff" or "Consolo") filed his Complaint, invoking the district court's jurisdiction under 28 U.S.C. § 1331. His original Complaint, like his Amended Complaint, contained nine (9) counts. These Counts were directed against one or more of the three (3) main defendants, i.e., Police Officer Daniel F. George (hereinafter "Officer George" or "George"), Police Officer Michael Mulvey (hereinafter "Officer Mulvey" or "Mulvey") and the City of Worcester (hereinafter "the City"); a Police Officer John Doe was never identified. George and Mulvey were sued in

both their official and individual capacities. The overwhelming focus at trial, as during pretrial discovery, consisted of Plaintiff's claims of assault and battery (Count VII) and constitutionally excessive force (Count IV), particularly as sanctioned by a de facto City of Worcester policy (Count V). The district court directed a verdict in the City's favor on Count V, and the jury returned a verdict in favor of Officers George and Mulvey on Counts VII and IV. Decidedly little attention was given to substantiating Consolo's 42 U.S.C. §1983 claim in Count I that Mulvey and George (in their individual capacities) had been deliberately indifferent to his medical needs. However, by way of special questions, the jury awarded Consolo $90,000.00 for this latter claim, the only claim of his nine on which he prevailed.

Officer George arrested Consolo on April 9, 1990 at approximately 1:30 a.m. on Glezen Street in Worcester, Massachusetts. Consolo claimed at trial that George and Mulvey had delayed transporting him from his arrest on Glezen Street directly to the hospital due to their deliberate indifference to his alleged medical needs; that they instead caused him to be transported by police wagon from Glezen Street to the Police Department to be booked, after which he was transported to the hospital at 2:20 a.m.; and that the fifty (50) minute booking delay proximately caused his injury. No one testified that treatment at an earlier time than 2:20 a.m. -- or earlier than fifty (50) minutes after his arrest at approximately 1:30 a.m. -- would have been any more effective than the treatment Consolo did receive at 2:20 a.m. No one testified that Consolo should even

have received an earlier treatment different from the 2:20 a.m. treatment.

Consolo claimed at trial that he had sustained both a black eye and a fractured pelvis on Glezen Street. He further claimed at trial that his black eye and his pelvic fracture should have been obvious on Glezen Street. He testified that he had assumed on Glezen Street that the police officers there knew he was in obvious pain because he was on the ground moaning and groaning and because he could not walk to the police wagon. (Trial Transcript ("Tr."), at 4-83.) No police officer heard Consolo moan and groan on Glezen Street, not Officer George (Tr., at 2-114), nor Officer Mulvey (Tr., at 3-35, 42, 8-96), nor Officer Doherty (Tr., at 3-27, 28), nor Officer Kowalchek (Tr., at 2-52), nor Officer McQueen (Tr., at 2-91). Nor did a single civilian hear Consolo assertedly

moan and groan on Glezen Street, not Helena Baroud (Tr., at 5-126), nor Everett Nault (Tr., at 7-29, 30), nor Madeline Carlson (Tr., at 7-72).

Likewise, every police officer testified that Consolo walked under his own power to the police wagon on Glezen Street, assisted by the police. So testified Officer George (Tr., at 2-113, 8-60), Officer Mulvey (Tr., at 3-32, 8-87, 8-93), Officer Doherty (Tr., at 2-28), and Officer Kowalchek (Tr., at 2-53). So, also, testified civilian witness Helena Baroud. (Tr., at 5-126, 127.)

The first time anyone besides Consolo heard him moan and groan, or saw his feet fail him, was in front of the booking camera at the Police Department. Consolo had been arrested and booked at the Worcester Police Department on occasions prior to April 9, 1990. (Tr., at 4-133,

134.) Because they had completed the arrest on Glezen Street, neither George nor Mulvey appeared in the booking room that night.

As for what the police officers on Glezen Street did observe as obvious concerning Consolo, Officer George testified that Consolo had been extremely intoxicated (Tr., at 2-104); and that he (George) had filled out an alcohol influence report form, noting that Consolo's speech was incoherent and the effects of alcohol were extreme. (Tr., at 2-134, 135.) Officer Kowalchek testified that Consolo was slow moving and sluggish, and that he did not respond in words to the officers. (Tr., at 2-69.)

Consolo himself readily testified that he was an alcoholic on April 9, 1990 (Tr., at 4-5); and that he had had a lot of alcohol that day. (Tr., at 4-7.) He

admitted that he was heavily intoxicated (Tr., 4-52); that when he drank, he got obnoxious (Tr., at 4-99) and even crazy (Tr., at 4-88), to the point where he admitted fleeing an earlier stop that night by Officer George, speeding away in a pickup truck with only three (3) tires and a metal rim which threw up a plume of sparks, and risking five (5) criminal charges because he wanted to avoid a simple towing fee. (Tr., at 4-104.) Consolo testified he never informed any officer at Glezen Street as to his pain, nor asked any officer there for any medical attention. When Sergeant O'Connor in the booking room asked Consolo if he wished to be examined by a physician of Consolo's choice, Consolo refused. (Tr., at 4-131.)

**B. Proceedings Below**

The district court denied, without comment, George and Mulvey's post-trial

motion for reconsideration of the jury instruction given on the concept of "deliberate indifference" to medical needs. In that motion, George and Mulvey had argued that the district court had defined "deliberate indifference" in its tort-law sense, rather than in its proper and appreciably stricter criminal-law sense; and that that improper instruction constituted plain error resulting in a clear miscarriage of justice which seriously affected the fairness and integrity of the trial. Plain error was argued because trial counsel, who were different from post-trial/appellate counsel, had not objected to the jury instruction.

The court of appeals agreed with George and Mulvey to the point of disapproving the instruction's definition of "deliberate indifference" as "gross

negligence." (App., infra, at 9a-10a.) However, any taint which that definition may have conveyed was cured, according to the court of appeals, by that instruction's alternative definition of "deliberate indifference" as "reckless disregard" or "recklessness." (Id.) Therefore, the court of appeals held there had been no plain error.

George and Mulvey had also brought a motion before the district court for judgment notwithstanding the verdict. George and Mulvey based their JNOV motion, in part, on their argument that they were qualifiedly immune, as a matter of law, from a finding of deliberate indifference to Consolo's medical needs. In denying the JNOV motion, the district court recited but made no comment on the qualified immunity argument. (App., infra, at 21a.)

The court of appeals affirmed the district court's denial of JNOV. As to qualified immunity, it ruled that, since City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983), there has been no doubt that a pre-trial detainee is entitled under 14th Amendment due process to medical attention for serious medical needs. Thus, given Consolo's condition when he entered the police station, George and Mulvey acted unreasonably in not seeking medical treatment for Consolo prior to bringing him to the station to be booked. (App., infra, at 13a-14a.)

## REASONS FOR GRANTING THE PETITION

### I. This Case Is Important Because It Presents The Court With The Opportunity To Decide, For The First Time, The Degree Of Culpability Necessary To Show A Denial Of A Pretrial Detainee's Due Process Right To Medical Care.

This case presents the Court with the

opportunity to decide the question explicitly left open in Canton v. Harris, 489 U.S. 378 (1989). In Canton, the Court stated:

> . . . this Court has never determined what degree of culpability must be shown before the particular constitutional deprivation asserted in this case -- a denial of the due process right to medical care while in detention -- is established. Indeed, in Revere v. Massachusetts General Hospital, 463 U.S. 239, 243-245 (1983), we reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody.

489 U.S. at 388 n.8. In Canton, one of the reasons why the Court continued to leave open this question, previously left open in Revere, was that there had concededly been a deprivation of the detainee's constitutional right to receive medical care. Id. at 388-89 n.8. Here, George and

Mulvey make no such concession.

Having alluded in Canton to the Eighth Amendment's "deliberate indifference" test, this Court in Farmer v. Brennan, ____ U.S. ___, 114 S. Ct. 1970, (1994), recently granted certiorari "because Courts of Appeals had adopted inconsistent tests for `deliberate indifference.'" Id. at _____, 114 S. Ct. at 1976 (contrasting McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991) ("holding that `deliberate indifference' requires a `subjective standard of recklessness'"), cert. denied, 503 U.S. ____, 112 S. Ct. 1265 (1992), with Young v. Quinlan, 960 F.2d 351, 360-61 (3rd Cir. 1992) ("`[A] prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate'"). These inconsistent tests for "deliberate indifference" arose in the context of the Eighth Amendment.

The Court resolved the inconsistency by defining "deliberate indifference" -- something it had never paused to do, Farmer v. Brennan, _____ U.S. at _____, 114 S. Ct. at 1977-78 -- as requiring a showing that a prison official was subjectively aware of a substantial risk to an inmate. Id. at ___, 114 S. Ct. at 1974. That is, Eighth Amendment level of culpability for "deliberate indifference" exists only if a prison official both

> knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at _____, 114 S. Ct. at 1979. Without also drawing that inference, an official's

culpability for failure to alleviate the risk to inmate health or safety may be tortious, but it is not unconstitutional because it is not an infliction of punishment proscribed by the Eighth Amendment. Id. In thus endorsing the Seventh Circuit's definition of "deliberate indifference" in McGill v. Duckworth, and rejecting the Third Circuit's definition in Young v. Quinlan, the Court in Farmer v. Brennan endorsed a criminal-law definition, and rejected a tort-law definition, of recklessness. Id. at _____, 114 S. Ct. at 1978-80. "[S]ubjective recklessness as used in the criminal law . . . [is hereby] adopt[ed] . . . as the test for "deliberate indifference" under the Eighth Amendment." Id. at _____, 114 S. Ct. at 1980.

Accordingly, the question explicitly left open by this Court in Canton v. Harris is thrown into even sharper relief by

Farmer v. Brennan. Namely, is subjective recklessness as used in the criminal law, which is the proper test for "deliberate indifference" under the Eighth Amendment, ____ U.S. at ____, 114 S. Ct. at 1980, also the proper test for "deliberate indifference" under the Fourteenth Amendment? Or is "something less than the Eighth Amendment's `deliberate indifference' test . . . applicable in claims by detainees asserting violations of their due process right to medical care while in custody"? Canton v. Harris, 489 U.S. at 388 n.8. It may well be, for example, that the Eighth Amendment's test for "deliberate indifference" as subjective recklessness in the criminal sense should also be the Fourteenth Amendment's test. After all, both Amendments prohibit punishment to a certain degree; punishment's normal meaning implies intent,

"`a deliberate act intended to chastise or deter;'" so that "only intentional or criminally reckless conduct can amount to punishment" -- including a denial of medical care to a pretrial detainee. Salazar v. City of Chicago, 940 F.2d 233, 239-40 (7th Cir. 1991) (citation omitted). This case provides the Court with the opportunity to decide, for the first time, the degree of culpability necessary to prove the infliction of punishment proscribed by the Fourteenth Amendment.

In short, Consolo presents itself as the Fourteenth Amendment companion case to Farmer v. Brennan.

II. The First Circuit's Application Of The "Deliberate Indifference" Standard In The Case Below Conflicts With The Fifth Circuit's Application Of The Reasonable Medical Care Standard, And Presents This Court With The Opportunity To Provide The Guidance Needed To Resolve This Conflict Among All The Circuits.

The court of appeals in this case

purported to be applying the "deliberate indifference" standard in deciding whether George and Mulvey had violated Consolo's Fourteenth Amendment due process right to medical care. In purportedly applying the "deliberate indifference" standard, the First Circuit in Consolo is in conflict with the Fifth Circuit, which applies a standard more protective of pretrial detainees. In Hare v. City of Corinth, MS., 36 F.3d 412 (5th Cir. 1994), the Fifth Circuit applies a standard, not of "deliberate indifference," but of reasonable medical care, in ruling upon whether police personnel were entitled to qualified immunity from a pretrial detainee's Fourteenth Amendment due process claim. Thus, the Fifth Circuit ruled in Hare that, at the time when the pretrial detainee had committed suicide, the police personnel

> were under a clearly established constitutional duty to provide pretrial detainees with reasonable care for serious medical needs, unless the deficiency reasonably served a legitimate governmental objective.

Id. at 415-16 (footnoting, in part, to three (3) Fifth Circuit cases holding that Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987), "clearly established [a] reasonable medical care standard" for pretrial detainee claims). The Fifth Circuit notes that "[o]ther courts of appeals have chosen to apply the [less protective] Estelle [v. Gamble, 429 U.S. 97 (1976), "deliberate indifference"] standard in the context of pretrial detainees, rather than the [more protective] reasonable medical care standard." 36 F.3d at 416 n.13 (citing, e.g., Ervin v. Busby, 992 F.2d 147 (8th Cir. 1993)).

Accordingly, the Eighth Circuit in Ervin v. Busby applies the "deliberate indifference" standard to pretrial detainee claims of inadequate medical care, observing that "[m]ost other courts that have addressed the issue have applied the deliberate indifference standard to pretrial detainees." 992 F.2d at 150 (citing, e.g., Danese v. Asman, 875 F.2d 1239, 1243 (6th Cir. 1989); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986); Whisenant v. Yuam, 739 F.2d 160, 163 n.4 (4th Cir. 1984); Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985)). Nonetheless, in Ervin v. Busby, the Eighth Circuit also states:

> Although this court has suggested that a more stringent [i.e., more protective] standard than deliberate indifference would be appropriate in assessing pretrial detainees' claims of inadequate medical care, no standard has been clearly established [by the Supreme Court].

992 F.2d at 150 (citing, in part, Boswell v. Sherburne County, 840 F.2d 1117, 1121 (8th Cir. 1988) (deeming it "unnecessary to rush into an area where the Supreme Court has, as yet, declined to tread" and "unwise because this question has provoked various responses from the courts of appeals") (footnote to circuit split omitted)).

In short, the First Circuit in Consolo appears to side with, for example, the Fourth, Sixth, Eighth and Tenth Circuits, and to be in conflict with the Fifth Circuit. However, the Eighth Circuit in Ervin v. Busby suggests a willingness to join the Fifth Circuit, insofar as a standard more protective of pretrial detainees than "deliberate indifference" would be appropriate in assessing their claims of inadequate medical care. 992 F.2d at 150 (citation omitted). Conversely, the Seventh Circuit was once in

the Fifth Circuit's camp, having held in Matzker v. Herr, 748 F.2d 1142, 1147 (7th Cir. 1984), that a pretrial detainee's due process right to be free from punishment is violated when the jailer "fails to promptly and reasonably procure competent medical aid" for a serious medical need. The Seventh Circuit later rejected Matzker's approach, and adopted the less protective "deliberate indifference" standard. See, e.g., Browning v. Figel, 950 F.2d 1285, 1290 n.5 (7th Cir. 1991). Even the Fifth Circuit may yet come to embrace the "deliberate indifference" standard, for the degree of "medical care due to a pretrial detainee [under the Fourteenth Amendment], as opposed to a convicted inmate [under the Eighth Amendment], may indeed be a distinction without a difference." Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987).

Thus, a conflict exists among the circuits as to the proper standard to apply to pretrial detainee claims of inadequate medical care, to the point where some circuits have abandoned, or are willing to abandon, one standard for another. The Consolo case at bar offers the Court the opportunity to provide the guidance needed to resolve this important conflict and its shifting allegiances.

Just as the Court granted certiorari in Farmer v. Brennan "because the Courts of Appeals had adopted inconsistent tests for `deliberate indifference'" under the Eighth Amendment, ___ U.S. ___, ___, 114 S. Ct. 1970, 1976 (1994), so too should the Court grant certiorari in this, the Fourteenth Amendment companion case to Farmer v. Brennan.

III. The First Circuit's Decision Below Is Erroneous, Both As To The Improper Tort-Based Jury Instruction On "Deliberate Indifference," And As To George And Mulvey's Entitlement To Qualified Immunity From The "Deliberate Indifference" Claim.

The court of appeals in this case found no error either in the district court's jury instruction on "deliberate indifference," or in the district court's denial of George and Mulvey's JNOV motion insofar as based on qualified immunity.

A. The jury instruction on "deliberate indifference" was erroneous, both because it was itself tort-based, and because it was given within an overall tort-based context.

1. The "deliberate indifference" instruction was itself tort-based.

Part I, supra, discusses how Farmer v. Brennan, _____ U.S. _____, 114 S. Ct. 1970 (1994), is the first time the Court has "paused to explain the meaning of the term `deliberate indifference.'" Id. at _____,

114 S. Ct. at 1977-78. The Court in Farmer v. Brennan surveys its use of that term in its prior cases, beginning with its first use in Estelle v. Gamble, 429 U.S. 97, 104 (1976). ____ U.S. at ____, 114 S. Ct. at 1978. In Estelle, which involved an inmate's Eighth Amendment claim of inadequate medical care, "deliberate indifference" was used to describe "a state of mind more blameworthy than negligence." Id. After Estelle, the Court read Estelle "for the proposition that Eighth Amendment liability requires `more than ordinary lack of due care for the prisoner's interests or safety.'" Id. (citing Whitley v. Albers, 475 U.S. 312, 319 (1986)). At the same time, Supreme Court cases showed that "deliberate indifference" "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." Id.

Thus, prior to Farmer v. Brennan, "deliberate indifference" had fluctuated "somewhere between the poles of negligence at one end and purpose or knowledge at the other." Id. The courts of appeals had addressed this fluctuation by "routinely equat[ing] deliberate indifference [either] with recklessness," id. (citations omitted), "or with gross negligence." Id. at ____ n.4, 114 S. Ct. at 1978 n.4. This is precisely the alternate terminology used by the district court in the case at bar.

Indeed, the court of appeals in Consolo did not err insofar as it disapproved of the district court's use of "gross negligence" to define "deliberate indifference." "Gross negligence" is a "'nebulous'" term, ____ U.S. at ____ n.4, 114 S. Ct. at 1978 n.4, and "deliberate indifference" commonly means more than gross negligence. Canton v. Harris, 489

U.S. 378, 388 n.7 (1989). But, in practice, "gross negligence" typically means "little different from recklessness as generally understood in the civil law." Farmer v. Brennan, ____ U.S. at ____ n.4, 114 S.Ct. at 1978 n.4 (citing Prosser, et al., Law of Torts §34, (5th ed. 1984), at 212). Given this practical indistinguishableness between "gross negligence" and "recklessness" as tort concepts, the question is whether the court of appeals in Consolo did err insofar as it held that the district court's use of "recklessness" cured the district court's disapproved use of "gross negligence" in defining "deliberate indifference."

It is readily apparent that the court of appeals in Consolo did err in so holding. After the district court had defined "deliberate indifference" as "gross negligence" or as "reckless disregard," it

gave the following instruction which the court of appeals held was curative:

> Thus, if you find that the defendants were aware that plaintiff was seriously in need of medical attention and failed to provide access to medical personnel or intentionally delayed such access, or if you find that defendants intentionally failed to cooperate with medical personnel who did see the plaintiff then you should find that the defendants are liable for a violation of plaintiff's constitutional rights in that regard. Although mere negligent or inadvertent inattention to plaintiff's medical needs does not amount to a violation of his constitutional rights, if you find that the defendants deliberately assumed a posture of indifference to his medical needs, you must find them liable for a violation of his constitutional rights.

(Tr., 8-127, 128.) This language is virtually a direct quote from Consolo's proposed jury instruction on "deliberate indifference." By his own admission in his appellate reply brief (at 14), Consolo's proposed instruction was, in turn, culled

from a treatise's model jury instruction "based on constitutional principles announced in Estelle v. Gamble, 429 U.S. 97 (1976)." M. Avery & D. Rudovsky, Police Misconduct Law and Litigation §13.3(e) (2d ed. 1980), at 13-7 n.12. But Estelle never articulated the proper understanding of "deliberate indifference" -- merely that it was something more than negligence. Farmer v. Brennan, ____ U.S. at ____, 114 S. Ct. at 1978. Because gross negligence is something more than negligence, an Estelle-based instruction on "recklessness" might well convey no more to the jury than "gross negligence" -- with which recklessness has practically the same meaning in tort law. Farmer v. Brennan, ____ U.S. at ____ n.4, 114 S. Ct. at 1978 n.4. There is nothing in Estelle which would necessarily lead a jury to understand "recklessness" in its criminal-law sense, particularly since

Estelle never defined "recklessness" and since "recklessness is not self-defining." Farmer v. Brennan, ____ U.S. at ____, 114 S. Ct. at 1978.

In Consolo, then, the Estelle-based instruction on "deliberate indifference" as "recklessness" could not possibly have cured the flawed idea of "deliberate indifference" as "gross negligence." Such an instruction could not possibly have adequately conveyed to the jury the proper idea of "deliberate indifference" as "recklessness" in the criminal-law sense. The court of appeals erred in ruling otherwise.

2. The tort-based "deliberate indifference" instruction was given within an overall tort-based context.

That the jury instruction wrongly conveyed to the jury the idea of "deliberate indifference" as "recklessness"

in the tort-law sense becomes even clearer when placed into the larger context of the overall jury instructions. Just prior to instructing on "deliberate indifference," the district court instructed on Consolo's Fourth Amendment excessive force claim. Graham v. Connor, 490 U.S. 386 (1989), requires that the excessive force inquiry be

> whether the officers' actions are `objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Id. at 397 (quotation omitted) (emphasis supplied). This excessive force inquiry is obviously an objective, tort-based inquiry. Such an inquiry is squarely contradictory to the subjective, criminal-based inquiry required to find "deliberate indifference." Yet, the district court did not make this all-crucial distinction. Instead, the

district court instructed that the jury had to decide if either George or Mulvey had intentionally or recklessly used excessive force on Consolo, a reckless act being defined as "conscious disregard of its known probable consequences." (Tr., at 8-124.) This definition is entirely consistent with the Second Restatement of Tort's definition of Reckless Disregard of Safety. See Restatement (Second) of Torts §500 (1965). Never was the jury led to consider such intentionality or such recklessness in anything other than its tort-based sense required by the Fourth Amendment's objective inquiry.

In short, the court of appeals erred insofar as it let stand the jury instruction on "deliberate indifference," an error which diluted the standard of proof so as to constitute plain error.

B. George and Mulvey are entitled to qualified immunity as a matter of law, because a pretrial detainee's due process right to medical care was not clearly established on the date of Consolo's arrest, nor even to this very day.

The arrest in this case occurred on April 9, 1990. On January 18, 1994, the First Circuit issued its decision in Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87 (1st Cir. 1994), and stated:

> There are, however, no clear constitutional guideposts as to the precise nature of the obligations that the Due Process Clause places upon the police to seek medical care for pretrial detainees who have been injured while being apprehended by the police.

Id. at 94 n.10 (citing Canton v. Harris, 489 U.S. 378, 388 n.8 (1988)). Thus, "given this lack of guidance as to what degree of medical care police officers are required to provide detainees," id. at 94 n.10, the First Circuit in Febus-Rodriguez

ruled that an official in that case was entitled as a matter of law to qualified immunity from a pretrial detainee's claim of deliberate indifference to medical needs.

Because the First Circuit declared in Febus-Rodriguez that there were no clear constitutional guideposts as to the precise nature of the Fourteenth Amendment obligation for police to seek medical care for pretrial detainees injured during arrests as of January 18, 1994, there could have been no clear constitutional guideposts as of April 9, 1990. Just as the official in Febus-Rodriguez was, therefore, entitled as a matter of law to qualified immunity from the claim of deliberate indifference to medical needs, so to George and Mulvey were likewise entitled. The court of appeals erred in denying they were entitled. Anderson v.

Creighton, 483 U.S. 635, 639-41 (1987).

True, Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983), upon which the court of appeals in Consolo based its denial of qualified immunity, does speak of a due process obligation that "the responsible government or governmental agency [has to] . . . provide medical care to persons . . . who have been injured while being apprehended by the police." Id. at 244. But Revere speaks only of a general obligation. See also Anderson, 483 U.S. at 639 ("there is a[n inadequate] sense in which any action that violates . . . [the Due Process] Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right"). Indeed, Revere explicitly declines to define with any specificity the scope of that due process obligation. Id. See also id. at 246

(opinion by Rehnquist, J., concurring in part and concurring in the judgment) ("I see no reason to decide in this case what requirements the Due Process Clause may impose upon a governmental agency by way of providing care to persons who have been injured while being apprehended by the police."). It is this question -- the scope of the government's due process obligation, or conversely, the scope of the corollary due process right to medical care for a pretrial detainee -- which Revere and Canton, 489 U.S. at 388 n.8 (citing Revere), have left open to this very day.

In addition, if this petition is granted, George and Mulvey would maintain that their conduct was objectively reasonable for qualified immunity purposes, given Consolo's heavy intoxication which they observed and which Consolo admitted at trial.

Because Consolo's due process right to medical care was not clearly established as of his arrest on April 9, 1990, George and Mulvey are entitled to qualified immunity. The court of appeals erred in denying their entitlement.

## CONCLUSION

For all the foregoing reasons, the Court should grant the petition for a writ of certiorari to the First Circuit to review the questions presented in this petition.

Respectfully submitted,

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Dated: October, 1995

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

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No. 94-1202

JOSEPH F. CONSOLO,

Plaintiff-Appellee,

v.

DANIEL F. GEORGE, ET AL.,

Defendants-Appellants.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, U.S. District Judge]
[Hon. Mark L. Wolf, U.S. District Judge]

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Before

Boudin, Circuit Judge,

Aldrich, Senior Circuit Judge,

and Young,* District Judge.

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Donald V. Rider, Jr., Assistant City Solicitor, with whom David M. Moore, City Solicitor, and Diana H. Horan, Assistant City Solicitor, were on brief for appellants.

Thomas C. Cameron, with whom Dennis J. Curran, and Curran & Cameron, were on brief for appellee.

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July 5, 1995

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* Of the District of Massachusetts, sitting by designation.

**YOUNG, District Judge.** Worcester Police Officers Daniel George ("Officer George") and Michael Mulvey ("Officer Mulvey") here appeal a jury verdict against them awarding $90,000 to Joseph F. Consolo ("Consolo") on the ground that the two officers violated Consolo's civil rights through deliberate indifference to his medical needs after taking him into custody. In view of the jury's verdict, we state the facts of record in the light most favorable to Consolo. See Aetna Casualty Surety Co. v. P&B Autobody, 43 F.3d 1546, 1552 (1st Cir. 1994).

On April 9, 1990, Consolo was driving in his pickup truck -- admittedly intoxicated -- when one of his tires went flat. Consolo kept going and, when spotted by Officer George, was driving on the rim which was emitting sparks. Officer George stopped Consolo but, when questioned, Consolo swore at him and drove off, attempting to escape. Officer George then called for back-up and five officers, in separate vehicles, responded, chasing Consolo for approximately 1.3 miles. Finally, his escape blocked by a police cruiser across the road, Consolo stopped.

At this point, the testimony diverges sharply. Consolo claims he was dragged from his pickup truck and stomped, kicked, and beaten while he lay helpless on the ground in unbearable pain from three separate fractures to his pelvis occasioned, he says, from his beating. The police witnesses took a different track,

testifying that Consolo had leapt from his pickup truck as soon as it came to a halt and that Officer George used only such force as was necessary to subdue and handcuff Consolo at which point Officer Mulvey and other police officers arrived. Consolo was then taken to police headquarters, booked, and ultimately brought to the hospital to receive medical treatment for what, it is undisputed, was a fracture pelvis. In closing, defense counsel argued that the medical evidence of the fracture was explained by Consolo's frantic leap from his pickup truck in an attempt to escape.

After the district court and counsel had partially winnowed Consolo's federal and state claims against the two officers and the City of Worcester ("City"), the case was submitted to the jury on special interrogatories. The jury ultimately found for the defendants on each of the questions

submitted, save only that it found that both Officers George and Mulvey had "exhibit[ed] deliberate indifference to Joseph Consolo's medical needs after his arrest" and assessed $90,000 damages for such failure.

Officers George and Mulvey raise four issues on appeal. We deal with each in turn.

1. The Jury Instructions

Balked of complete vindication on but a single count, Officers George and Mulvey scrutinize the trial record with care, now focusing on the district court's explanation of the concept of "deliberate indifference" in the jury instructions.

The district judge instructed the jury as follows:

> Now, the term "deliberate indifference." Plaintiff also claims that he was denied adequate medical care after his arrest. Deliberate indifference to serious medical needs of prisoners violates the constitutional right of due

process of law. Deliberate indifference is more than a showing of negligence. Rather, it has been described as gross negligence or reckless disregard. The idea of deliberate indifference might be expressed in two ways. One is to disregard intentionally and deliberately the duty to act in a certain way, and the other is to be intentionally and deliberately indifferent to whether or not there is a duty and to whether or not some action is needed to perform that duty.

Thus, if you find that the defendants were aware that plaintiff was seriously in need of medical attention and failed to provide access to medical personnel or intentionally delayed such access, or if you find that defendants intentionally failed to cooperate with medical personnel who did see the plaintiff, then you should find that the defendants are liable for a violation of plaintiff's constitutional rights in that regard. Although mere negligent or inadvertent inattention to plaintiff's medical needs does not amount to a violation of his constitutional rights, if you find that the defendants deliberately assumed a posture of indifference to his medical needs, you must find them liable for a violation of his constitutional rights.

(Tr. 8-127, 128) (emphasis added).

No one objected to these instructions at trial. See Fed. R. Civ. P. 51 (requiring a party who believes jury instruction to be erroneous to object before the jury retires to consider the verdict). Generally, an objection to jury instructions not made at trial as required by Rule 51 cannot be raised successfully on appeal. Scarfo v. Cabletron Sys. Inc., Nos. 94-1929, 94-1982, 94-1983, 1995 WL 264714 (1st Cir. May 12, 1995) at *8 (describing this Rule as the "use it or lose it" principle). Accordingly, we may disturb the jury's verdict here only if the challenged instruction constituted plain error. See Transnational Corp. v. Rodio & Ursillo, Ltd., 920 F.2d 1066, 1069 (1st Cir. 1990). Plain error is a very high standard, and will be found only when the court's erroneous instructions "result[] in a `clear miscarriage of justice' or

'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" Id. (citations omitted).

Officers George and Mulvey nevertheless claim that the jury instructions were fatally flawed. They point to the First Circuit's opinion in Manarite v. City of Springfield, in which this Court defined "deliberate indifference" as "more than ordinary negligence, and probably more than gross negligence." 957 F.2d 953, 956 (1st Cir.), cert. denied, 113 S. Ct. 113 (1992).[1] The officers argue that by equating the concept

1 Officers Mulvey and George argue that the decision of the Supreme Court in Farmer v. Brennan, 114 S. Ct. 1970, 1070-81 (1994), decided after the trial at issue here, bolsters their position. In Farmer, the Supreme Court adopted a subjective test for evaluating deliberate indifference in the Eighth Amendment context. The present case arises in the context of the due process clause under the Fourteenth Amendment. In view of the "plain error" analysis in the text, we decline to engage in an analysis of Farmer in these premises.

of "deliberate indifference" with "gross-negligence," the district judge so diluted the standard of proof as to constitute plain error. We disagree.

In Manarite, a jail suicide case, this Court explained that

> when liability for serious harm . . . is at issue, a plaintiff must demonstrate "deliberate indifference" by showing (1) an unusually serious risk of harm . . . (2) defendant's actual knowledge of (or, at least, willful blindness to) that elevated risk, and (3) defendant's failure to take obvious steps to address that known, serious risk. The risk, the knowledge, and the failure to do the obvious, taken together must show that the defendant is "deliberately indifferent" to the harm that follows.

957 F.2d at 956.

The trial court's single reference to the concept of gross negligence here, however, did not seriously affect the integrity of this proceeding. Though mentioning the concept "gross negligence" together with recklessness in its general

definition, the court went on at once to instruct the jury that to find deliberate indifference it had to find that the police officers were aware "that plaintiff was seriously in need of medical attention" and, further, that the police officers "deliberately assumed a posture of indifference to [Consolo's] medical needs," or "intentionally failed to cooperate with medical personnel." (Tr. 8-128) Taken in context, and considered in light of the entire charge, these instructions adequately conveyed to the jury the analytic elements that are the necessary predicate to concluding that either Officer George or Officer Mulvey had acted with such recklessness as to constitute deliberate indifference. While we disapprove of the reference to "gross negligence" in this context, there is here no plain error given the careful and detailed particularity of the jury

instructions in their entirety.

2. Motion for Judgment Notwithstanding the Verdict

"The district court may grant a motion for judgment notwithstanding the verdict only after a determination that the evidence could lead a reasonable person to only one conclusion, namely, that the moving party was entitled to judgment." Hendricks & Assocs. v. Daewoo Corp., 923 F.2d 209, 214 (1st Cir. 1991) (citations and internal quotations omitted). "Appellate review of a denial of judgment n.o.v. is governed by the same stringent rules as those that apply to the district court." Nydam v. Lennerton, 948 F.2d 808, 810 (1st Cir. 1991).

Officers George and Mulvey advance two arguments in their attempt to demonstrate that the district court was required to grant their motion for judgment notwithstanding the verdict. First, they

argue, no reasonable jury could have concluded from the evidence at trial that the delay in affording Consolo medical care proximately caused his injuries to worsen. George and Mulvey unfortunately focus their argument too narrowly. Here the jury could well have based its decision not only upon a finding that the officers' deliberate indifference caused Consolo's medical condition to worsen, but also upon a finding that their deliberate indifference left him in pain and suffering for a longer period that would otherwise have been the case had he been afforded prompt medical attention. The booking video, introduced as evidence at trial, shows Consolo in excruciating pain, barely standing even with assistance. In fact, for the first few minutes of the video, Consolo is lying on the floor unable to get up. In light of this evidence, the jury could reasonably conclude that the delay in providing

Consolo medical treatment entitled him to damages for pain and suffering.

Second, Officers George and Mulvey argue that as matter of law they were entitled to qualified immunity in the circumstances presented at trial[2] and thus are entitled to judgment n.o.v. "[The] operative inquiry on qualified immunity is not whether the defendants actually abridged the plaintiffs' constitutional rights, but whether the defendants' conduct was objectively reasonable, given the constitutional understandings then current." Crooker v. Metallo, 5 F.3d 583, 585 (1st Cir. 1993).

Here the constitutional standard is clear. Since at least 1983 there has been

2 No appeal has been taken from the denial of the pre-trial motion to dismiss on the ground of qualified immunity. This is hardly surprising given the allegations of excessive force by the police. The jury having rejected these allegations as unproven, George and Mulvey now focus on the deliberate indifference claim to which the jury gave credence.

no doubt that a pre-trial detainee is entitled to medical attention for serious medical needs under the due process clause of the Constitution. See City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983). Applying this legal standard to the record before the district judge, there was ample evidence that, given Consolo's condition at the time he entered the police station, the officers acted unreasonably in not seeking medical treatment for him before bringing him to the booking room. Accordingly, the district court properly denied the claim of qualified immunity and submitted the issue to the jury.

3. Motions for a New Trial

Officers George and Mulvey urge reversal of the decision of the district court to deny their motions for a new trial. "A district court should order a new trial only when convinced that the clear weight of the evidence so requires,



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or that a miscarriage of justice w otherwise result." Veranda Beach Club Ltd. v. Western Sur. Co., 936 F.2d 1364, 1384 (1st Cir. 1991). We will reverse the decision of a district court upon such a motion only where there has been an abuse of discretion. There was no abuse of discretion here. At bottom, the arguments of the police officers on this aspect of the case depend entirely upon their assessment as to the credibility of the evidence. Having already concluded that the evidence was sufficient to warrant the jury's verdict, the jurors' assessment of credibility is conclusive and the decision of the district court to deny the motion for a new trial was well within its discretion.

4. Remittitur

Finally, Officers George and Mulvey argue that the district court abused its discretion in denying their motion for



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remittitur. When the jury first returned to the courtroom with its verdict, it found that Officers George and Mulvey were deliberately indifferent to Consolo's medical needs, that the City (but neither Officers George nor Mulvey) was grossly negligent on a pendant state claim, and awarded Consolo $90,000. The district court pointed out to the jury that the finding against the City on the state claim was inconsistent with its finding for Officers George and Mulvey on that point, as the City could there liable only upon a theory of vicarious liability, and the jury had not found the police officers liable. The jury was instructed to continue its deliberations and, when it returned a verdict the second time, it had eliminated any finding against the City but retained its award to Consolo of $90,000 against Officers George and Mulvey for deliberate indifference.

Officers George and Mulvey now claim that the only way justly to construe the jury's verdict is to conclude that, because the City was somehow found a proximate cause of the damage to Consolo in the jury's first return, the award of $90,000 to him cannot stand as this sum remained consistent in both the first and second verdicts. There is nothing to this argument. It reduces to the claim that, because the City was let off, the damages should be reduced. But whatever the basis for liability, here Consolo's damages were the same and each defendant, if liable at all, is liable jointly and severally for full damages. As the verdict was entirely consistent with the evidence, the assessment of damages cannot be disturbed unless the award exceeded "any rational appraisal or estimate of the damages that could be based upon the evidence" or was "grossly excessive," "inordinate,"

"shocking to the conscious of the court," or "so high that it would be a denial of justice to permit it to stand." Segal v. Gilbert Color Systems, Inc., 746 F.2d 78, 81 (1st Cir. 1984), quoting Grunenthal v. Long Island R.R. Co., 393 U.S. 156, 159 n.4, 89 S. Ct. 331, 333 & n.4 (1968). No remittitur was required here.

The arguments of Officer George and Officer Mulvey having been tried and found wanting, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | |
|---|---|
| JOSEPH F. CONSOLO, Plaintiff<br><br>v.<br><br>DANIEL F. GEORGE, MICHAEL MULVEY, and JOHN DOE, an unknown police officer in the City of Worcester, individually and as police officers, City of Worcester and THE CITY OF WORCESTER, MASSACHUSETTS, Defendants | CIVIL ACTION<br>No: 92-40047-NMG |

**MEMORANDUM AND ORDER**

GORTON, J.

Pending before this Court are the motions of defendants George and Mulvey for 1) judgment notwithstanding the verdict, pursuant to Fed.R.Civ.P. 50(b) and 2)for a new trial on the issue of defendants' liability for deliberate indifference to medical needs, pursuant to Fed.R.Civ.P. 59 or, in the alternative, for remittitur of the damage award to zero. Plaintiff

opposes both motions.

After a jury trial, on October 25, 1993, the defendant police officers were found to be liable for deliberate indifference to plaintiff's medical needs, which conduct proximately caused harm to plaintiff. Defendants were not found to be liable under numerous other counts in the complaint. Damages were assessed by the jury in the amount of $90,000.

I. **JUDGMENT AS A MATTER OF LAW**

Defendants request that this court enter judgment notwithstanding the jury's verdict (which we treat as a motion for judgment as a matter of law) based upon defendants' claims of qualified immunity and the lack of legally sufficient evidence to find that defendants were deliberately indifferent to plaintiff's medical needs as a result of which he suffered harm. Pursuant to Fed.R.Civ.P. 50, judgment as a matter of law may be granted when there is

no legally sufficient evidentiary basis for a reasonable and fair-minded jury to find for a party, with respect to an issue upon which that party has the burden of proof. See, Scott v. Land Span Motor, Inc., 781 F.Supp. 1115, 1118 (D.S.C. 1991). A trial judge may not grant such relief unless the evidence is such that a reasonable jury could come to only one conclusion. Worden v. Consolidated Rail Corp., 689 F.Supp. 35 (D.Mass. 1988), citing, Wagenmann v. Adams, 829 F.2d 196, 200 (1st Cir. 1987); Joia v. Jo-Ja Service Corp., 817 F.2d 908, 910-11 (1st Cir.), cert. denied sub nom, ____ U.S. ____, 108 S.Ct. 703 (1988).

In considering such a motion, this Court must draw all inferences in favor of plaintiff, the nonmoving party, Id., and must not evaluate the credibility of the witness nor the weight of the evidence. See, Conway v. Electro Switch Corp., 825 F.2d 593, 598 (1st Cir. 1987). Applying

that standard of review, if there is substantial evidence supporting the verdict, the entry of a judgment for defendants as a matter of law would be improper. Id., at 598-599.

Defendants argue that, as a matter of law, they are entitled to a qualified immunity from liability because plaintiff failed to present sufficient evidence that: 1) defendants violated a clearly established standard or violated plaintiff's constitutional rights of which a reasonable officer would have known, or 2) defendant officers' conduct was objectively unreasonable, or 3) defendants' conduct proximately caused harm to plaintiff.

Turning to the relevant evidence presented at trial, this Court finds that contrary to the arguments set forth by defendants, there was sufficient, although limited, grounds for a reasonable jury to

find the defendants liable for deliberate indifference. The booking videotape and witness testimony make it clear, both visually and audibly, that plaintiff had sustained severe injuries, was in pain, was unable to walk on his own and was in need of immediate medical attention. Furthermore, there was sufficient medical testimony concerning plaintiff's injuries to support the findings of the jury.

After considering the evidence, this Court cannot conclude that a reasonable jury could find only that the defendants were not deliberately indifferent to plaintiff's medical needs or that defendants' conduct was not the proximate cause of plaintiff's harm. Moreover, the jury was entitled to resolve the conflicting testimony surrounding the April 9, 1990 incident according to its own evaluation of the credibility of the witnesses presented by each party.

Accordingly, defendants' motion for a judgment as a matter of law, will be denied.

**II. MOTION FOR A NEW TRIAL**

Defendants request that, in the alternative, this Court order a new trial, pursuant to Fed.R.Civ.P. 59 on the issue of deliberate indifference to medical needs. In order to grant a new trial based upon the sufficiency of the evidence, this Court must find that the verdict is against the clear weight of the evidence such that upholding the verdict would result in a miscarriage of justice. Worden, 689 F.Supp. at 37, citing Conway, 825 F.2d at 598; see also, Wallace Motor Sales v. American Motor Sales Corporation, 780 F.2d 1049, 1063 (1st Cir. 1985). This Court cannot grant a new trial merely because it may have reached a contrary conclusion to that of the jury, rather, the jury's verdict can be set aside only if warranted

under the above-described standard.

The analysis undertaken by this Court with respect to defendants' motion for judgment as a matter of law applies with equal force to the analysis of the motion for a new trial. Based upon the evidence reviewed above, this Court finds that the jury's verdict on the deliberate indifference count is not against the clear weight of the evidence or a manifest miscarriage of justice. Accordingly, defendants' motion for a new trial based upon the sufficiency of the evidence will also be denied.

III. REMITTITUR OF DAMAGES

Finally, defendants also request, in the alternative, remittitur of the damages awarded to zero. In contemplating the modification of a jury verdict, the United States Court of Appeals for the First Circuit has required the courts to apply a strict and deferential standard. See,

Worden, 689 F.Supp. at 39. To disturb the verdict in the case at bar, this Court would have to determine that the jury's award exceeded "any rational appraisal or estimate of the damages that could be based upon the evidence before the jury" or was "grossly excessive," "inordinate," "shocking to the conscience of the court," or "so high that it would be a denial of justice to permit it to stand." Worden, supra at 39, citing Segal v. Gilbert Color Systems, Inc., 746 F.2d 78, 81 (1st Cir. 1984), quoting, Grunenthal v. Long Island R.R. Co., 393 U.S. 156, 159 & n.4, 89 S.Ct. 331, 333 & n.4 (1968).

After due reflection, this Court deems the award of $90,000 damages to be within the realm of what it considers reasonable based upon the evidence presented in this case. Consequently, this Court denies defendants' request that the damages awarded by the jury be modified.

## ORDER

For the foregoing reasons, it is hereby ordered that:

1) defendants' motion for judgment as a matter of law is DENIED;

2) defendants' motion for a new trial on the issue of deliberate indifference is DENIED; and

3) defendants' motion, in the alternative, for remittitur of the damages awarded is DENIED.

So ordered,

/s/
Nathaniel M. Gorton
United States District Judge

Dated: January 31, 1994.

(2)

Supreme Court, U.S.
FILED
OCT 23 1995
CLERK

No. 95-611

# IN THE
# Supreme Court of the United States

October Term, 1995

DANIEL F. GEORGE AND MICHAEL MULVEY,
INDIVIDUALLY AND AS POLICE OFFICERS OF
THE CITY OF WORCESTER,

*Petitioners,*

*v.*

JOSEPH F. CONSOLO,

*Respondent.*

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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25 pp

## QUESTIONS PRESENTED

I. Does this case present the Court with an appropriate vehicle to decide the degree of culpability necessary to show a denial of a pretrial detainee's Due Process right to medical care?

II. Does this case present an appropriate vehicle for resolving any perceived conflict between the Fifth Circuit's "reasonable medical care" standard for pretrial detainees' Fourteenth Amendment claims of deprivation of medical attention, and the "deliberate indifference" standard employed in the First and other Circuits?

III. Is the First Circuit's decision below erroneous?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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Daniel F. George and Michael Mulvey,
Individually and as Police Officers
of the City of Worcester,
Petitioners,

v.

Joseph F. Consolo,
Respondent.

---

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent Joseph F. Consolo respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 58 F.3d 791 (1st Cir. 1995).

## STATEMENT OF THE CASE

### A. The Facts

Petitioners' recitation of events of "The Arrest" is an exercise in selectivity which is designed to suggest to this Court that the respondent was not injured on April 9, 1990, but rather was feigning injury for the booking videocamera, and that he somehow fractured his pelvis at a later time, and fraudulently blamed the police officer petitioners. That argument failed to persuade the jury, failed to convince the trial judge on post-trial motions and failed to convince the First Circuit Court of Appeals. This Court is not an appropriate forum for a fourth bite at the evidentiary apple.

A more balanced and complete version of the relevant facts is found in the

First Circuit's opinion, and is quoted verbatim here:

> "On April 9, 1990, Consolo was driving in his pickup truck -- admittedly intoxicated -- when one of his tires went flat. Consolo kept going and, when spotted by Officer George, was driving on the rim which was emitting sparks. Officer George stopped Consolo but, when questioned, Consolo swore at him and drove off, attempting to escape. Officer George then called for back-up and five officers, in separate vehicles, responded, chasing Consolo for approximately 1.3 miles. Finally, his escape blocked by a police cruiser across the road, Consolo stopped.
>
> "At this point, the testimony diverges sharply. Consolo claims he was dragged from his pickup truck and stomped, kicked, and beaten while he lay helpless on the ground in unbearable pain from three separate fractures to his pelvis occasioned, he says, from his beating. The police witnesses took a different tack, testifying that Consolo had leapt from his pickup truck as soon as it came to a halt and that Officer George used only such

> force as was necessary to subdue and handcuff Consolo at which point Officer Mulvey and other police officers arrived. Consolo was then taken to police headquarters, booked, and ultimately brought to the hospital to receive medical treatment for what, it is undisputed, was a fractured pelvis. In closing, defense counsel argued that the medical evidence of the fracture was explained by Consolo's frantic leap from his pickup truck in an attempt to escape."

Contrary to the petitioners' assertion here, Mr. Consolo did not claim at trial that his fractured pelvis was proximately caused by the fifty minute booking delay. Rather, his claim was that three separate fractures of his pelvis were caused by a police beating, and that his pain and suffering was unnecessarily and grievously extended and exacerbated by the booking delay. The jury rejected Consolo's testimony that the police defendants had beaten him, preferring the

officers' testimony tending to show that Consolo had injured himself jumping from his truck in an attempt to escape. Nevertheless, they awarded Consolo $90,000 for the officers' delay in getting him medical attention.

On appeal to the First Circuit, the petitioners made much of an argument that while the booking delay might have modestly increased Consolo's pain and suffering, a $90,000 award for that modest enlargement was excessive. Having the advantage of seeing the booking videotape, in which Consolo's agony was evident while being mocked and forced to stand, the jury obviously believed otherwise, and the trial judge and First Circuit both concluded, having seen the videotape as well, that the award was within the realm of reason.

Now, recognizing that excessiveness of the damages is not a "certworthy" issue, the petitioners have retreated to the thrice-failed scenario that Mr. Consolo was performing for the camera.

B. Proceedings Below

On the issue of deliberate indifference to medical needs, the trial judge charged as follows:

> "Now, the term 'deliberate indifference.' Plaintiff also claims that he was denied adequate medical care after his arrest. Deliberate indifference to serious medical needs of prisoners violates the constitutional right of due process of law. Deliberate indifference is more than a showing of negligence. Rather, it has been described as gross negligence or reckless disregard. The idea of deliberate indifference might be expressed in two ways. One is to disregard intentionally and deliberately the duty to act in a certain way, and the other is to be intentionally and deliberately indifferent to whether or not there is a

duty and to whether or not some action is needed to perform that duty.

"Thus, if you find that the defendants were aware that plaintiff was seriously in need of medical attention and failed to provide access to medical personnel or intentionally delayed such access, or if you find that defendants intentionally failed to cooperate with medical personnel who did see the plaintiff, then you should find that the defendants are liable for a violation of plaintiff's constitutional rights in that regard. Although mere negligent or inadvertent inattention to plaintiff's medical needs does not amount to a violation of his constitutional rights, if you find that the defendants deliberately assumed a posture of indifference to his medical needs, you must find them liable for a violation of his constitutional rights."

The petitioners did not object to this instruction. They had neither requested nor suggested an instruction at variance with this instruction. They did

not ask for any modification or amplification of the special jury question crafted by the trial judge on deliberate indifference, but rather expressed satisfaction with all of the court's proposed jury questions. Finally, petitioners' post-trial motions for judgment notwithstanding the verdict and for a new trial specifically acknowledged the correctness of the trial court's charge on deliberate indifference. (See attached).

It was not until four months after the entry of judgment that the petitioners unveiled the argument that deliberate indifference should have been defined in a criminal law sense, rather than a tort law sense, in a motion for reconsideration of their j.n.o.v. and new trial motions.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. IS THIS CASE THE FOURTEENTH AMENDMENT COUNTERPART TO CANTON V. HARRIS?

If the First Circuit had affirmed a trial judge who had simply instructed a jury that "deliberate indifference equals gross negligence", and who had then proceeded to define "gross negligence" in traditional terms, this case might, as claimed by the petitioners, present an appropriate vehicle for examining an issue left open in Canton v. Harris, 489 U.S. 378 (1989): the degree of culpability needed by a pretrial detainee to make out a Fourteenth Amendment violation based on the withholding of medical care.

That did not, however, happen in this case. True, as noted by the First Circuit, the trial judge did begin his exposition of "deliberate indifference" by noting that it is more than negligence, and that "it has been described as gross negligence or reckless disregard," but he immediately followed with a definition of "deliberate indifference" that is unassailable, and, indeed, is one with which even the petitioners have no complaint.

The petitioners invite this Court, as they invited the First Circuit, to examine the trial judge's brief and isolated reference to gross negligence in a vacuum. The First Circuit declined that invitation and found the instructions to be adequate when considered in their entirety.

Even if the trial judge had simplisticly equated deliberate indifference with gross negligence, this case would not be a suitable vehicle for expanding Canton v. Harris to Fourteenth Amendment - pretrial detainees because the petitioners utterly failed to complain about the charge or otherwise preserve the point at trial. The petitioners did not ask the trial court for the definition of deliberate indifference they now champion; they did not complain about the instructions as given, but rather expressed complete accord with the judge's charge, with one minor exception not relevant here; and they did not complain about the instructions in their post-trial motions for judgment n.o.v. or for a new trial. The petitioners bring to this Court an inappropriate vehicle for sweeping changes.

If this Court were inclined to visit the issue of the scope of deliberate indifference in the pretrial detainee/ Fourteenth Amendment context, it should await a case in which the trial judge's charge is black or white, but not some shade of grey, and in which the party claiming to be aggrieved has saved his or her rights.

## II. SHOULD THIS COURT TAKE THIS CASE IN ORDER TO ADDRESS PERCEIVED CONFLICTS BETWEEN THE FIFTH AND OTHER CIRCUITS?

This case is not an appropriate vehicle for resolving perceived conflicts between the Fifth and other Circuits. The petitioners concede that the Fifth Circuit standard, "reasonable medical care", described in Hare v. City of Corinth, MS, 36 F.3d 412 (5th Cir. 1994),

is more protective of pre-trial detainees than the deliberate indifference standard applied below, and in the Fourth, Sixth, Eighth and Tenth Circuits.

The petitioners therefore benefited from any failure of the courts below to apply a standard more protective of pre-trial detainees. If this Court were inclined to consider whether there exists a direct and important conflict among the circuits on this issue, and to resolve that conflict one way or the other, it should await a case from the Fifth Circuit in which a defendant is actually aggrieved by the trial court's application of the standard more protective of pretrial detainees, or a case from one of the other circuits in which a plaintiff is actually aggrieved by the use of the less protective

standard. The petitioners here, having benefited from the standard applied below, simply lack standing to invoke the claimed conflict.

Put differently, a choice by this Court that the Fifth Circuit standard is correct and the deliberate indifference standard is wrong would not entitle the petitioners to a new trial or otherwise affect the result below. Obviously, were this Court to choose against the Fifth Circuit standard, it would follow that the result below was correct.

That petitioners have no legitimate interest in the "conflict" issue they now champion is demonstrated by their failure to cite Hare v. City of Corinth, MS, supra, to the trial court or the First Circuit. The issue may be interesting, but it is not the petitioners' issue.

## III. WAS THE JUDGMENT BELOW ERRONEOUS?

While it has long been clear that this Court has broader concerns than the correction of "mere" error, it is also true that the presence of error is sometimes a factor in the granting of certiorari. Therefore, respondent briefly addresses petitioners' third point, that the First Circuit's decision was wrong.

The First Circuit did not err in refusing to condemn the trial judge's definition of deliberate indifference because that definition, considered in context, adequately conveyed to the jury the elements essential to a finding that the petitioners acted with such recklessness as to constitute deliberate indifference. That definition enjoys

support in the First Circuit, Manarite v. City of Springfield, 957 F.2d 953 (1st Circuit 1992); Fourth Circuit, Yuam, 739 F.2d 160 (4th Cir. 1984); Sixth Circuit, Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989); Seventh Circuit, Salazar v. City of Chicago, 940 F.2d 233 (7th Cir. 1991); Eighth Circuit, Ervin v. Busby, 992 F.2d 142 (8th Cir. 1993); Ninth Circuit, Jones v. Johnson, 781 F.2d 769 (9th Cir. 1986); and Tenth Circuit, Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985). Its use below, perceived conflicts with the Fifth Circuit aside, was hardly error.

Neither was it error for the First Circuit to consider the instructions as a whole rather than isolating the trial judge's brief mention of gross negligence, particularly where the petitioners approved the instruction at trial and

failed to complain about it until four months later, in a motion for reconsideration.

Nor was it error for the First Circuit to reject the petitioners' qualified immunity argument. The conduct under consideration took place in 1990. Seven years earlier, in 1983, this Court had established, in City of Revere v. Massachusetts Gen'l Hosp., 463 U.S. 244 (1983), that pre-trial detainees are constitutionally entitled to medical attention for serious medical needs. It is folly, given the dramatic videotape evidence favorable to Consolo, to argue that the petitioners' conduct was objectively reasonable, given the constitutional understandings then current.

Petitioners' remaining arguments to the First Circuit, that their motion for a

new trial should have been allowed, and that the damages should have been reduced, were both fact-driven, and have not been presented to this Court as certworthy.

Neither of the petitioners' claims of error to this Court has merit. The case is an unremarkable example of the difficult burdens an appellant faces when he fails to save his rights.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 92-40047XX (GN)

JOSEPH F. CONSOLO,
Plaintiff,

V.

DANIEL F. GEORGE, MICHAEL MULVEY, AND JOHN DOE, an unknown police officer in the City of Worcester, individually and as police officers, City of Worcester and THE CITY OF WORCESTER MASSACHUSETTS,
Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTIONS FOR NEW TRIAL OR IN THE ALTERNATIVE FOR REMITTITUR

## I. STANDARD OF REVIEW

Rule 59 of the Federal Rules of Civil Procedure recognizes the common law principle that a trial judge, who is not satisfied with a jury verdict, has a duty to set it aside and grant a new trial so that justice is served. Klein v. Auto Owners Insurance Co., 39 F.R.D. 24 (D.C. Minn., 1965). A Federal District Court judge has the discretion to grant a new trial if the verdict appears to be against the weight of the evidence. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 78 S. Ct. 893 rehearing denied 357 U.S. 933, 78 S. Ct. 1366 (1958). In fact, when the verdict is against the clear weight of the evidence, it is the duty of the trial judge to set it aside. Dunkin v. Dunkin, 377 F. 2d 49 cert. denied 389 U.S. 913, 88 S. Ct. 239 (1967); Bedwell v. Grand Trunk Western R. Co., 226 F. 2d 150 (1955); Magee v. General Motors Corp., 213 F. 2d 899 (1954).

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B. THIS COURT SHOULD GRANT DEFENDANTS' MOTIONS FOR A NEW TRIAL BECAUSE THE JURY VERDICT WAS UNJUST AND THE RESULT OF PASSION, PREJUDICE AND SYMPATHY.

1. The Jury's Responses To The Verdict Questions Were Inconsistent.

The jury's answers to the verdict questions, although appearing to be facially consistent, are, in fact, contradictory when read in conjunction with the Court's charge to the jury and the applicable law. The Court instructed the jury that:

> Deliberate indifference is more than a showing of negligence. Rather, it has been described as gross negligence or reckless disregard. (emphasis added)

Thus the Court properly instructed the jury that deliberate indifference must involve either gross negligence or recklessness. The Court also charged the jury that gross negligence:

> . . . amounts to indifference to present legal duty. (emphasis added)

Thus the Court equated gross negligence with indifference. The Court also defined intentional conduct to include deliberate conduct:

> An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately. . . (emphasis added)

The jury answered yes to the question of whether the defendant police officers exhibited deliberate indifference to Consolo's medical needs after his arrest. The jury answered no, however, to the questions of whether the defendants intentionally or recklessly violated Consolo's constitutional rights and whether defendants were grossly negligent. Given the

Supreme Court, U.S.
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No. 95-611

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**In The**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1995

---

Daniel F. George and Michael Mulvey,
Individually and as police officers
of the City of Worcester,
Petitioners,

v.

Joseph F. Consolo,
Respondent.

---

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

---

**PETITIONERS' REPLY TO BRIEF IN OPPOSITION**

---

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November 1995

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Petition for a Writ of Certiorari to the
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---

# PETITIONERS' REPLY TO BRIEF IN OPPOSITION

---

## INTRODUCTION

In an example par excellence of the maxim that the best defense is a good offense, Respondent Joseph F. Consolo's Brief in Opposition ("Opp. Br.") adopts a stunning tactic. That tactic is to coronate the trial court's definition of "deliberate indifference" as "unassailable." (Opp. Br., at 10.) Indeed, in what is assuredly news to George and Mulvey, the trial court's definition is "one with which even the petitioners have no complaint." (Opp. Br., at 10.) In

essence, Consolo's tactic blithely charges that, because George and Mulvey's Petition presents no viable legal issues, it is relegated to simply taking "a fourth bite at the evidentiary apple" by retreating "to the thrice-failed scenario that Mr. Consolo was performing for the [police booking] camera." (Opp. Br., at 2, 6.)

George and Mulvey present no such scenario to this Court. Consolo's Brief in Opposition is a victim of taking its own blithe tactic too seriously, failing as it does to provide any meaningful analysis of the Petition's legal issues which are of constitutional importance to municipalities and their police officers nationwide. Instead, Consolo's Brief in Opposition raises three (3) new but erroneous points, as will now be demonstrated.

## ARGUMENT

### I. This Case Is The Fourteenth Amendment Counterpart To Farmer v. Brennan, Not, As Respondent Asserts, To Canton v. Harris.

The first new point in Consolo's Brief in Opposition to the Petition for a Writ of Certiorari is embraced by his question, "IS THIS CASE THE FOURTEENTH AMENDMENT COUNTERPART TO CANTON V. HARRIS?" (Opp. Br., at 9.) Consolo answers that this case is not "a suitable vehicle for expanding Canton v. Harris to Fourteenth Amendment-pretrial detainees." (Opp. Br., at 11.)

At best, Consolo's Q & A grossly misreads the issue expressly presented by George and Mulvey's Petition (at 13-19): that Consolo presents itself as the Fourteenth Amendment counterpart to Farmer

v. Brennan, ___ U.S. ___, 114 S. Ct. 1970 (1994), and its Eighth Amendment definition of "deliberate indifference" as recklessness in the criminal-law sense.

At worst, Consolo's Q & A betrays a radical misunderstanding of Canton v. Harris, 489 U.S. 378 (1989). In Canton, this Court held "that a municipality can be liable for failure to train its employees when the municipality's failure shows 'a deliberate indifference to the rights of its inhabitants.'" Farmer v. Brennan, ___ U.S. at ___, 114 S. Ct. at 1980 (quoting Canton, 489 U.S. at 389). But Canton's holding merely interpreted municipal failure-to-train liability under 42 U.S.C. § 1983, id., a statute "which merely provides a cause of action" and which, therefore, "'contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.'" Id. at ___, 114 S. Ct. at 1981 (quoting Daniels v. Williams, 474 U.S. 327, 330 (1986)). Indeed, Canton explicitly left open the state-of-mind question whether the Eighth Amendment's definition of "deliberate indifference," or something less, applies to a pretrial detainee's Fourteenth Amendment due process right to medical care. 489 U.S. at 388 n.8.

Thus, Consolo fails to "bear in mind Chief Justice Marshall's admonition that 'we must never forget, that it is a constitution we are expounding.'" Daniels, 474 U.S. at 332 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)(emphasis in original)). Prior to Farmer v. Brennan, this Court had never paused to expound upon the constitutional meaning of the term "deliberate

indifference." Id. at ___, 114 S. Ct. at 1977-78. That case offered the Court the opportunity to do so within the meaning of the Eighth Amendment. This case offers the Court the same opportunity to do so within the meaning of the Fourteenth Amendment. Consolo's conspicuous failure to cite Farmer v. Brennan -- not even once -- shows his desire that the Court not seize that opportunity, even as it seized it in Farmer v. Brennan.

II. This Case Presents A Certworthy Question As To The Conflict Among The Circuits Regarding The Proper Fourteenth Amendment Standard To Apply To Pretrial Detainee Claims Of Inadequate Medical Care, A Question In Which, Contrary to Respondent's Assertion, Petitioners Have A Stake.

Consolo's second new point is that this Court should deny certiorari because George and Mulvey have no stake in the conflict among the circuits as to the proper Fourteenth Amendment standard to apply to pretrial detainee claims of inadequate medical care. This, assertedly, is because George and Mulvey benefited "from any failure of the courts below to apply a standard more protective of pretrial detainees," such as the Fifth Circuit's reasonable medical care standard in Hare v. City of Corinth, MS., 36 F.3d 412 (5th Cir. 1994). (Opp. Br., at 12-13.)

Consolo's point is off-point. Supreme Court Rule 10(a) provides that one of the compelling reasons for which this Court may discretionarily grant certiorari is when:

> a United States court of appeals has entered a decision in

> conflict with the decision of another United States court of appeals on the same important matter....

Thus, the Court granted certiorari in Farmer v. Brennan, ___ U.S. ___, ___, 114 S. Ct. 1970, 1976 (1994), "because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference'" within the meaning of the Eighth Amendment. Precisely the same reason, albeit in the Fourteenth Amendment context, applies to Consolo, because the First Circuit has adopted a test inconsistent with the Fifth Circuit's test.

Moreover, contrary to Consolo's assertion, George and Mulvey did not benefit "from any failure of the courts below to apply a standard more protective of pretrial detainees." Rather, because such a standard was applied, they were aggrieved. The First Circuit viewed the jury instruction in Consolo as consistent with its earlier opinion in Manarite v. Springfield, 957 F.2d 953 (1st Cir. 1992). But while Manarite defined "deliberate indifference" as recklessness, that definition was held insufficient by this Court in Farmer v. Brennan, precisely because recklessness is not self-defining. ___ U.S. at ___, 114 S. Ct. at 1978 (citing, in part, Manarite, 957 F.2d at 957). George and Mulvey could hardly have benefited from a "deliberate indifference" jury instruction based on an insufficient definition of recklessness, inasmuch as such a definition diluted the standard of proof at trial.

Nor is the conflict between the First and the Fifth Circuits merely an

"interesting" one. (Opp. Br., at 14.) The jury instruction in Consolo containing the insufficient definition of "deliberate indifference" was, Consolo concedes, based on the Eighth Amendment case, Estelle v. Gamble, 429 U.S. 97 (1976). (Petition, at 29-31.) This fact immediately injects Eighth Amendment considerations into the Fourteenth Amendment Consolo case. It also puts Consolo at odds with the Fifth Circuit which, in Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987), rejected the Estelle standard in the context of medical claims by pretrial detainees and held:

> pretrial detainees are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective.

Id. at 85. In so holding, the Fifth Circuit relied on this Court's opinion in Bell v. Wolfish, 441 U.S. 520 (1979), that:

> if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Id. at 539 (footnote omitted). "Significantly," the 1979 Bell opinion makes no mention of the 1976 Estelle standard of "deliberate indifference." Grabowski v. Jackson County Public Defenders Office, 47 F.3d 1386, 1395 (5th Cir. 1995). Thus, the conflict between the First Circuit and the Fifth Circuit is identical to the conflict between Estelle and Bell, respectively. And, while George and Mulvey would contend that Farmer v. Brennan's refinement of the Estelle standard of "deliberate indifference" under the Eighth Amendment should also govern under the Fourteenth Amendment, the Fifth Circuit opines otherwise. Grabowski, 47 F.3d at 1397 n.19.

Therefore, the certworthy question posed by this circuit conflict -- the resolution of which George and Mulvey certainly have a stake in -- is: does the Fourteenth Amendment require that the governmental actor's state of mind be shown to be reckless in the criminal-law sense, or does it not? For example, the answer offered by the Seventh Circuit is that "only intentional or criminally reckless conduct in the medical treatment of a pretrial detainee -- that is, deliberate indifference to the detainee's serious medical need -- violates due process." Salazar v. City of Chicago, 940 F.2d 233, 239 (7th Cir. 1991)(construing Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986)). This Court has consistently been in harmony with Seventh Circuit precedent in crafting its Eighth Amendment "deliberate indifference" opinions. See, e.g., Farmer v. Brennan, ___ U.S. at ___, 114 S. Ct. at 1991 (Thomas, J., concurring in the judgment)("the Seventh Circuit has long

followed the rule of law the Court lays down today" regarding "deliberate indifference")(citing, in part, Duckworth v. Franzen). No evidence existed at trial that George and Mulvey criminally intended to inflict punishment upon, "to chastise or deter," Consolo. Duckworth v. Franzen, 780 F.2d at 652. Reliance on Seventh Circuit precedent in the case at bar would mean that George and Mulvey did not have the state of mind constitutionally required to violate the Fourteenth Amendment.

III. Petitioners' Right To Challenge The First Circuit's Erroneous Rulings On The "Deliberate Indifference" Jury Instruction And On Qualified Immunity Remains Alive, Contrary To Respondent's Assertion.

Consolo's third new point is that George and Mulvey did not preserve their rights, and thus lack the standing, to challenge the errors contained in the First Circuit's decision. (Opp. Br., at 11-12, 16.) However, George and Mulvey argued to the First Circuit, and continue to argue, that the jury instruction on "deliberate indifference" was plain error resulting in a clear miscarriage of justice which seriously affected the fairness and integrity of the trial. See, e.g., Transnational Corp. v. Rodio & Ursillo, Ltd., 920 F.2d 1066, 1069 (1st Cir. 1990). Although ultimately finding no plain error, the First Circuit took this argument seriously and analyzed the jury instruction. In contrast, Consolo's conspicuous failure to cite -- not even once -- the very case upon which his jury instruction on "deliberate indifference" was based, Estelle v. Gamble, 429 U.S. 97 (1976), betrays his concern that this Court

engage in that analysis.

Likewise, Consolo fails to come to grips with the qualified immunity issue. Even the First Circuit acknowledged in Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87 (1st Cir. 1994), that which it failed to acknowledge later in Consolo: that no clear constitutional guideposts yet exist as to the precise nature of the due process duty which police must satisfy in according medical care to pretrial detainees. 14 F.3d at 94 n.10 (citing Canton v. Harris, 489 U.S. 378, 388 n.8 (1989)). Consolo furnishes this Court with the appropriate implement to erect that constitutional guidepost.

## CONCLUSION

For the aforementioned reasons, and for the reasons set forth in their Petition for a Writ of Certiorari, George and Mulvey respectfully urge this Court to grant their Petition.

Respectfully submitted,

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Dated: November, 1995